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No. 88-1488

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

CITY OF DALLAS,

Petitioner,

v.

VIDEO INTERNATIONAL PRODUCTIONS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the chief city building inspector's issuance of zoning violation notices at the request of the Dallas City Council, and in accordance with guidelines established by the City's final zoning policymaker, the City of Board of Adjustment, constitutes the exercise of the City's "final policymaking authority" under 42 U.S.C. section 1983, as interpreted by this Court in *City of St. Louis v. Praprotnik*, 485 U.S._____, 108 S. Ct. 915 (1988).

PARTIES TO THIS PROCEEDING

In addition to those parties named in the caption, the following is also a party to this proceeding:

Warner-Amex Cable Communications, Inc.
Defendant-Appellee

The following are potential parties to this suit:

Frank Parrish	Plaintiff-Appellant
Jack Weiss	Plaintiff-Appellant

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COUNTERSTATEMENT OF THE CASE

The Dallas Board of Adjustment (also known as the Board of Zoning Appeals) is the City of Dallas' final policymaking body for interpretation of the Dallas Zoning Code. The Petitioner City of Dallas does not contest this point. *See* City of Dallas' Petition for Writ of *Certiorari* at 3, 5.

Before the incidents giving rise to this suit, the Chief Zoning Inspector, Ray Couch, had previously requested and received guidance from the Board of Adjustment on enforcing the Dallas Zoning Code in the cable television context. This occurred when a VIP competitor, Silver Screen, had appealed a ruling of the Dallas Building Official that it could not charge for the cable services it rendered to customers. (VIP Tr. Exs. 75-81.)[1] In conjunction with that episode, Couch had requested an interpretation from the Board of Adjustment that non-franchised cable services could not cross property lines or the public right of way. (Couch Tr. III, p. 122.) In March, 1981, the Board of Adjustment adopted this interpretation of the zoning code. *See* Trial Exhibit 62, which contains a transcript of the Silver Screen proceeding before the Board of Adjustment.

On September 2, 1981, the Dallas City Council instructed city officials to issue citations to VIP if VIP's cables were crossing property lines. The Dallas City Council is empowered to regulate and restrict Dallas land use. Tex. Rev. Civ. Stat. Ann. art. 1011a (Vernon Pamp. Supp. 1987).

On September 11, 1981, owners of buildings serviced by VIP were served notices of zoning violations by the City of Dallas. The owners were told they had 15 days to cease use of VIP cable television facilities.

These notices caused VIP's customers to reject VIP's services. In addition, VIP shut down service in order not to be in defiance of the then-current interpretation of zoning law.

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[1] Tr. Exs. means Trial Exhibits; Tr. III, p. 122 means Trial Transcript, Volume III, at page 122.

These actions caused financial harm to VIP.

The zoning violation notices were served at the express instruction of the Dallas City Council. In addition, Ray Couch, chief zoning inspector, testified that VIP's systems were illegal because they crossed lot lines. (Couch, Tr. III, p. 10.) This interpretation was the precise one approved by the Board of Adjustment at Couch's request during the Silver Screen episode. Stated otherwise, the zoning violation notices were authorized by the city council. They were also issued in accordance with a previous interpretation of the zoning code, adopted by the Board of Adjustment.

REASONS FOR DENYING THE WRIT

a. In what amount to determinations of fact, the courts below correctly found the city's final policymaking authority was behind the notices of zoning violation.

The City of Dallas has argued that this Court should grant its petition for writ of *certiorari* because the zoning violation notices were not "final" government action that could lead to 42 U.S.C. section 1983 liability. The City argues that the actions were taken by municipal officials who did not have policymaking authority under *City of St. Louis v. Praprotnik*, 485 U.S. _____, 108 S. Ct. 915 (1988). *See* Petition for *certiorari* at 6.

The City constructs an elaborate argument concerning the effect of an available procedure whereby VIP could have appealed the violation notices to the Board of Adjustment. According to the City, because VIP could have appealed the notices, the building inspector was not an official imbued with policymaking authority sufficient to subject the City of Dallas to 42 U.S.C. section 1983 liability.

This argument is an attempt to relitigate an essentially factual issue, which the lower courts have correctly decided. The District Court for the Northern District of Texas and the Fifth Circuit Court of Appeals both concluded the zoning

violation notices represented final city policymaking. However, the two courts offered alternative rationales for their findings.

The District Court for the Northern District of Texas found as a matter of fact that the city council authorized the notices. District Court's slip opinion No. CA3-81-1722-D at 26 (N.D. Tex., May 19, 1987) (reproduced in City of Dallas' Petition for *certiorari*, Appendix C, at 30a, 50a). There is no doubt that even an isolated act of a city's properly constituted legislative body is a municipal act which can subject the city to 42 U.S.C. section 1983 liability. *See, e.g., Newport v. Fact Concerts Inc.*, 453 U.S. 247 (1981); *Owen v. City of Independence*, 445 U.S. 622 (1980).

The court did not determine whether the building inspector was a final policymaker himself. Instead, the court found the city council a final policymaker under Tex. Rev. Civ. Stat. Ann., art. 1011a (Vernon Pamp. Supp. 1987). The court stated the zoning violation citations "evidence[d] ... city policy." District Court's slip opinion at 26 (reproduced in City of Dallas' Petition for *certiorari*, Appendix C, at 50a).

Unlike the district court, the Fifth Circuit focused on the Board of Adjustment's powers. The Fifth Circuit found that as the highest policymaking body, the Board of Adjustment had already adopted an interpretation of the zoning law which was subsequently applied against VIP. The court's holding was prefigured by the fact that the city itself, in another zoning case, considered the Board's ruling as controlling precedent.

Specifically, after the events which underlie this case, VIP was sold, and its assets eventually formed the basis for a new company called Cable Dallas. In proceedings against Cable Dallas for the same zoning violations complained of here, the City offered Inspector Couch's affidavit in opposition to defendants' summary judgment motion. Couch's affidavit cited the Board of Adjustment's Silver Screen ruling as controlling precedent. Specifically, Couch stated:

> "In Case No. BDA 81-126/4409 on application of Silver Screen, Inc., The Board of Adjustment of

> the City of Dallas upheld the decision of the building official.... The decision of the building official and the upholding of that decision by the Board of Adjustment indicates both the consistent application of the Dallas Development Code to prohibit microwave dish antenna systems from serving more than one building site in residential neighborhoods and supports Plaintiff [sic] contention that the microwave dish antenna systems which are the subject of this suit fall within the radio, television or microwave tower use."

February 26, 1982 Affidavit of Ray Couch In Answer to Defendants' Motion for Summary Judgment in *Cable Dallas*, par. 3 (part of VIP Exhibit 62).

Like the City in the *Cable Dallas* case, the Fifth Circuit found that the Board of Adjustment's interpretation was a final expression of city policy. *Video Int'l Production Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F. 2d 1075, 1087, *en banc reh'g denied*, 866 F. 2d 1417 (5th Cir. 1988) (reproduced in City of Dallas' Petition for *certiorari*, Appendix A at 1a, 22a). Stated otherwise, the Fifth Circuit found that in executing the zoning violation notices, the building inspector was acting pursuant to policy determinations by the Board of Adjustment. Based on this alternative rationale, the Fifth Circuit found that when the Board of Adjustment's policy determination was combined with issuance of zoning violation notices by the highest city official empowered to execute zoning policy, the result was a policy decision that could be attributed to the city. *Video Int'l Production Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F. 2d at 1087 (reproduced in City of Dallas' Petition for *certiorari*, Appendix A at 22a). In light of these facts and these determinations, the theoretical potential for VIP to appeal the matter back to the same board is insufficient to relieve the City of 42 U.S.C. section 1983 liability.

b. The precepts of *City of St. Louis v. Praprotnik* are upheld by the Fifth Circuit's decision.

The city's arguments in support of *certiorari* are attempts to dress a body of facts in a suit of law. As such, the petition must be denied. However, even if the law were the basis of its petition, the city's Petition would still fail.

In *City of St. Louis v. Praprotnik*, 485 U.S. _____, 108 S. Ct. 915 (1988), a plurality of this Court expanded on previous holdings that a municipality could be held liable under 42 U.S.C. section 1983 only for those acts which the municipality officially sanctioned. *Id.*, 108 S. Ct. at 924. The Court recognized that a dilemma could arise when a municipal final policymaker created a policy which a subordinate subsequently ignored. The Court emphasized that the touchstone is the policy itself, not the unauthorized departure from it. *Id.*, 108 S. Ct. at 926. Nevertheless, the Court also noted that under certain circumstances, a final policymaker's post-facto approval of a subordinate's decision could transform that subordinate's decision into an official one.

Here, the City suggests that the Fifth Circuit incorrectly applied this portion of *Praprotnik*. This is allegedly because the Board did not ratify the Building Inspector's VIP decision. City of Dallas' Petition for *certiorari*, at 8.

Praprotnik, however, is not to be interpreted so mechanistically. In noting the subordinate-departure scenario, the Court made a general statement about the effect of subsequent approval. *Praprotnik* did not, however, lay down a rule that only post-facto approval of a discretionary decision would make a subordinate's action into official policy. Instead, the Court specifically cautioned that a municipality could be liable under 42 U.S.C. section 1983 "if a particular decision by a subordinate was cast in the form of a policy statement and expressly approved by the supervising policymaker." *Id.*, 108 S. Ct. at 927.

In this case, the supervising policymaker Board of Adjustment had expressly pre-approved the Building Inspector's

interpretation of the Dallas Zoning Code. Further, the city council authorized the sending of the zoning violation notices. Thus, this case fits squarely within the Court's admonition. The Building Inspector carried out policy. The City Council helped set that policy. In sending out zoning notice violations, the Building Inspector relied upon an interpretation of the zoning code which the Board of Adjustment had expressly pre-approved. Under these circumstances, there is no *Praprotnik* subordinate-departure problem.

The concurring justices in *Praprotnik* noted that they would have found municipal liability under 42 U.S.C. section 1983 where an official or legislative body made a decision which inflicted harm, even though the decision giving rise to the harm was not intended to govern future situations. *Id.*, 108 S. Ct. at 932. By applying this alternative rationale, the City of Dallas would also be liable here. The Board of Adjustment was responsible for the adoption of the interpretation of zoning law later specifically applied against VIP. Similarly, the City Council specifically requested application of the zoning law against VIP. Consequently, under the consurrence's rationale, this is more than sufficient to establish the city's liability.

The Fifth Circuit correctly applied *Praprotnik* to the facts of this case. The Petition for Writ of *Certiorari* should be denied.

CONCLUSION

For the foregoing reasons, the Respondents respectfully request that the City of Dallas' Petition for Writ of *Certiorari* be denied.

Respectfully submitted,

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